UNITED STATES OF AMERICA.

SUPREME COURT.

RAY W. JONES, *Appellant,*

vs.

PATRICK MEEHAN AND JAMES MEEHAN, *Respondents.*

Brief for Appellant.

STATEMENT OF THE CASE.

Prior to the second day of October, A. D., 1863, the land in question in this cause was occupied by the Red Lake and Pembina bands of Chippewa Indians and on that day these Indians entered into a treaty with the United States through its commissioners, Alexander Ramsey and Ashley C. Morrill, wherein the Indians ceded to the United States the land therein described.

There is in this treaty, however, a reservation or exception of a portion of the land ceded, expressed as follows:

"Article IX. Upon the urgent request of the Indians, parties to this treaty, there shall be set apart from the tract hereby ceded, a reservation of (640) six hundred and forty acres near the mouth of Thief River, for the Chief "Moose Dung," and a like reservation of (640) six hundred and forty acres for the chief, "Red Bear," on the north side of Pembina River."

13 U. S. Statutes at Large, 667-671.

After this treaty the Chief "Moose Dung" made selection of the land desired by him and made it a stopping place when not with his band, roaming, hunting and fishing; but before it was surveyed into the usual legal subdivision, this old Chief Moose

Dung died, and at the time of the platting into legal subdivisions in 1879, the present Chief Moose Dung notified the agent in charge of the Chippewa Indians, of the claim and selection made.

The history of this transaction and final designation is very fully and completely set forth in the record in the documents found on pages 118-119-120-121-221-224-225, the substance of which is that there is set apart for the heirs of Chief Moose Dung six hundred and forty (640) acres of land in accordance with Article IX of the treaty, of which the land in question in this cause is a part, and is withheld from entry, and designated on all Government maps as "Moose Dung's reservation." The present Chief Moose Dung occupied the tract in substantially the same manner the elder chief had done, living there a portion of the time when not roaming, hunting and fishing on the reservation with his band; but neither of whom ever cultivated any portion of it, except a garden, such as is usually done by Indians wherever they take up their abode. (R. 67 and 73.)

On the seventh day of November, 1891, the appellees procured the signature of the present Chief to the document, Exhibits A, B, C, found on page 112 of the record, which is the lease decreed to a be valid and subsisting lease by the court below and which is the subject of this appeal, and on the 10th day of November, 1891, filed the same for record in the office of the Register of Deeds for the county of Polk, Minnesota, being the political division of Minnesota in which the land lies.

But the appellees never joined in this lease and never took possession of the premises therein described until the 13th day of December, 1894. (R. 46 and 86.)

On the 20th day of July, 1894, the appellant procured the signature of the present chief to the instrument found on page 226 of the record, and on the 24th day of July, 1894, executed the same on his part, and on the 4th day of August, 1894, there was passed by the Congress of the United States and approved by the President thereof, a resolution, defendant's exhibit 5, found on page 228, wherein the Secretary of the Interior is "authorized to approve if, in his discretion, he deems the same proper and advisable, and upon such terms and limitations as he may impose" this lease, and afterwards and in the 13th day of November, 1894, the Acting Secretary of the Interior approved this lease by endorsing thereon the language found in the

record on page 227, and set forth his reasons in a letter to the Commissioner of Indian Affairs under date of November 13th, 1895, found on page 249 of the record, *et seq.*, and this approval by the Acting Secretary is approved by the Secretary of the Interior in a letter to the Chief of the Indian Division, found on page 228 of the record, dated December 27th, 1894, in which he says: "Pending an investigation of the character of title held by Chief Monsimoh, as well as his relations to the Chippewa tribes, I directed that the execution of the letter prepared by the First Assistant Secretary be suspended.

After a full investigation I am satisfied that the Department has authority to approve a lease of the property made by Monsimoh, and you will forward at once the letter."

On the 10th day of August, 1894, thirty days after the date of the appellant's lease, the appellees procured from the Indian Monsimoh a lease of the same premises and sought to have the same approved by the Secretary of the Interior, but this lease, with the lease in question, was before the department and was disapproved by the letter of Acting Secretary Sims, (defendant's exhibit C. in record, page 249,) to the Commissioner of Indian Affairs.

After the approval of the lease by the Acting Secretary of the Interior and on the 16th day of November, 1894, the appellant, Ray W. Jones, accepted in writing, endorsed on the lease, the terms and conditions of the approval thereof, and on the 15th day of December, 1894, the Chief in writing accepted and agreed to the same (R. 227.)

After the approval of the lease, as hereinbefore set forth, and on the 5th day of December, 1894, appellant went upon the land and made measurements and stuck iron stakes in the ground to indicate the location of a saw-mill to be built thereon, at which time there was on said land nothing in the form of improvements whatever (R. 124, Q. 1, *et. seq.*), but soon afterwards appellees entered and built a temporary house, resting on the land and supported by piles in the water at the point indicated by the stakes driven by appellant as the place where there would be taken from the river into the mill the logs to be sawed into lumber, and set posts and attached barbed wire thereto, along the line of the river bank. (46, 84 and 151.)

The elder chief was, and the present chief is, the chief of a band of Indians, and maintains his tribal relations and is an annuitant of the government (R. 159, 166 and 147.).

Upon payment of the rent by appellant to the agent in charge of the Chippewa Indians in Minnesota, as provided in the terms of approval, the Commissioner of Indian Affairs directed the agent to ascertain the heirs of the elder Chief who were entitled to share in the rent (R. 232, *et seq.*,) whereupon it was determined by the Department of the Interior that the heirs of the elder Chief were entitled to share in the rent (R. 238), and the rent money was accordingly distributed among those persons (R. 145 and 159) who were the heirs of the elder Chief (R. 164 to 177). After the Department had so determined the heirs of the elder Chief, appellant procured from them the lease, defendant's exhibit 17, found on page 239 of the record, and asked the court to grant him leave to file a supplemental answer, setting forth these facts, which motion, with the affidavits and the proposed supplemental answer, are found in the record, commencing on page 259 and following, which application was denied in the order found on page 264 of the record.

The appellant procured the lease of this land for the purpose of locating and operating thereon a saw mill and enterprises appurtenant thereto, and for that purpose had organized a corporation with a capital stock of $100,000 (R. 126 and articles 229).

The appellees have a mill below on the river and seek to control this point for the purpose of keeping appellant from locating a mill there, but it would not even inconvenience the appellees. (See R. 123, and 198 to 210.)

Upon these facts the appellant claims:

First. That prior to the cession by the Indians to the Government the Indian title was the right of occupancy in perpetuity with the power to part with that right to the Government only.

Second. That by the treaty they ceded their lands except the reservation on which they now live and the Moose Dung reservation as a home for the old Chief.

Third. That by the construction put upon this reservation in the treaty by the Government, the heirs of the older Chief have the same right of occupancy in perpetuity that the tribe have of their reservation and upon the same limitations.

Fourth. That no title can be acquired from the Indians except by the consent of the Government.

Fifth: That these heirs of the elder Chief being tribal Indi-

ans their contracts are invalid until approved by the Government.

Sixth. That appellees' lease, not having been approved by the Government, is invalid, and appellant's lease, approved by the Government, is prior and superior to the appellees' lease.

Seventh. That appellant has all the rights in the land, both of Indians and the Government.

Eighth. That appellees' lease is unilateral and they had never taken possession of the lands described therein.

Ninth. That appellees' lease was procured by deception and unfair dealing and over-reaching, and is not the contract of the present Chief.

Tenth. That at the time of the taking of appellant's lease, appellees' knew of it and were present and could have given appellant notice, but did not, and are thereby estopped from now claiming under their lease.

Eleventh. That appellees subsequently secured a lease and sought the approval thereof by the Government and thereby conceded this lease, under which they now claim, to be void and are now estopped to deny the authority of the Government over the land and the Indian.

Twelfth: That the construction put upon the treaty by the Government, is binding upon the court.

Thirteenth: That the Department of the Interior has decided that the title held by the heirs of the elder Chief is that of occupancy only in perpetuity, and is binding upon the appellees and the court.

Fourteenth: That the Department of the Interior has decided that the heirs of the elder Chief are tribal Indians and under the guardianship of the Government, and their contracts are invalid unless approved by the Government, and that is the law of this case and binding on the complainants and this court.

Fifteenth: Tnat appellees only motive in holding their lease is to prevent an enterprise in competition with their own.

Sixteenth: That under appellee's claim of the law of the case they have a lease of only one sixth of the land described in their lease and appellant has a valid lease to five-sixths of that portion described in this lease.

Eighteenth: That appellees claim that the land in question is necessary to enable them to carry on their business, is not supported by the evidence.

Nineteenth: Defendant is seeking the location for the purpose of erecting and carrying on a saw mill.

Twentieth: The description in appellee's lease is uncertain and for that reason void.

And for these reasons the decree of the court below is erroneous and should be set aside. And the lease of the appellant, held to be a valid and subsisting demise of the land superior to that of appellees.

ASSIGNMENTS OF ERROR.

The appellant insists on each and every assignment of error alleged in the record at page 258 and 259.

ARGUMENT.

It is conceived that these several propositions may be conveniently discussed under four general heads.

I.

The character of the title held by the elder Chief and now held by his heirs under the treaty of 1863.

II.

The status of the elder Chief and his heirs.

III.

The authority of the Government to control the contract of these heirs affecting the land in question.

IV.

The equities of this case.

I.

THE CHARACTER OF THE TITLE HELD BY THE ELDER CHIEF AND NOW HELD BY HIS HEIRS UNDER THE TREATY OF 1863.

"At the time of the discovery and settlement of America, the many Indian tribes inhabiting that portion now embraced within the limits of the United States were recognized by the various Governments under whose authority the settlements by the whites were made, and by each other, as separate, distinct and

independent political communities capable of maintaining the relations of peace and war under the laws and customs of nations. The several Governments under whose authority and by whose subjects this country was discovered and settled, became entitled to the right to pre-empt the land from the natives as against each other and all other European powers.

Of necessity, each Government was exclusively entitled to the right to extinguish the Indian title to the country claimed and occupied by it, and this right of course abridged the right of the Indian to the extent, that he could only dispose of his title in the land occupied by him to that Government which claimed and had the right of pre-emption, and in which the absolute ultimate title or the fee rested."

Commissioner of Indian Affairs Report, 1891, Volume 1, page 9.

"The European nations which respectively established colonies in America, assumed the ultimate dominion to be in themselves, and claimed the exclusive right to grant a title to the soil subject only to the Indian right of occupancy. The natives were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it and to use it according to their discretion, though not to dispose of the soil at their own will, except to the government claiming the right of pre-emption."

3, Kent's Commentaries, 379, et. seq.

It is the law of the land, and no court of justice can permit the right to be disturbed by speculative reasonings or abstract rights. Ibid.

The title of the Indians in the land they occupy is the right of possession in perpetuity, and the Government of the United States has the sole right to acquire from them this right.

Cherokee Nation vs. State of Georgia, 5 Peters, 1.
Worcester vs. State of Georgia, 6 Peters, 515.
Graham vs. McIntosh, 8 Wheaton, 542.
Mitchell vs. United States, 9 Peters, 711.

The Indian right is that of occupancy; and until this right shall be extinguished by purchase, no possession adverse to it can be taken. It is also admitted that a mere reservation of the Indian right to a certain part, within described boundaries leaves the right reserved, as it stood before the cession.

Godfrey vs. Beardsley, 2 McLean, 412.
Wheeler vs. Me-shin-go-me-sia, 30 Ind., 402.

Prior to the treaty of 1863, October 2, the Red Lake and Pembina bands of Chippewa Indians were in the occupancy of and owned the perpetual right to occupy certain lands on both sides of Thief River in Minnesota. By the terms of that treaty the Indians ceded to the United States all of their lands west of Thief River, and some of their lands on the east side of said river. The lands which they reserved for themselves are on the east side of the river. The lands reserved to the elder Chief Mon-si-moh are on the west side of Thief River, opposite to what is known as the present Red Lake Indian Reservation. It is very evident that the object of Article IX. of this treaty was to reserve to Chief Mon-si-moh this land.

There is no language in the treaty which indicates that this Chief was to receive any other title to these lands than that held by the band of Indians to which he belonged in their present reservation. He was at that time one of the chiefs of his tribe, and remained so until the time of his death.

By this treaty the Indians ceded to the United States their lands, except the reservation on which they now live, and the 640 acres reserved to Mon-si-moh and a like quantity to Red Bear.

Making a reservation as this was made by the 9th Article of the treaty, is in effect excepting it from the operation of the treaty, and leaves it in the situation that their present reservation occupies, viz: not affected by the treaty.

There is nothing in the treaty to indicate that it was the intention of the United States or the Indians that a fee simple should pass to Mon-si-moh.

The circumstances surrounding the parties at the date of the treaty, the object for making it, the location of the home of this Indian Chief, all go to show that the intention was merely to make a reservation in his behalf individually, the same as that made for his tribe on the east side of Thief River, and these facts and circumstances all contradict the idea that it was the intention of the treaty to confer upon this Chief a fee simple title in these lands, for he was at that time a Chief and remained so during his life, and it was not intended that he should separate himself from his tribe or lose any of his tribal authority or any right or interest in the tribal lands or other property.

There are neither words of grant or estoppel in this Article IX.

In construing treaties the courts have adopted the general rules, which are applied in the construction of statutes, contracts and written instruments generally.

U. S. vs. Payne, 8 Fed., 883-892.
Amiable Isabella, 6 Wheaton, 1.
U. S. vs. Percheman, 7 Peters, 51-83.
Steamship Co. vs. Hedden, 43 Fed., 20.
U. S. vs. D'Auterive, 10 How., 609.
Strother vs. Lucas, 12 Peters, 410-438.

The construction of the treaty to be taken as the true one, is the one which has been adopted and acted upon by all parties to it.

U. S. vs. Payne, 8 Fed. Rep., 892.

And it is clearly and well settled that in the construction of a written contract the intention and meaning of the parties must be ascertained from the terms of the writing, the nature of the transaction and the surrounding circumstances, and they cannot be allowed to testify as to their understanding and intention.

Kyle vs. Bellinger, 79 Ala., 516.

No testimony of the parties to this treaty as to what they intended, or their construction of this treaty, can in any view be competent. To admit the competency of such evidence would be to lay down a rule that every solemn treaty upon the Statute Books could be wrested to the individual sentiments, desires and influences of those seeking advantages under it. Such a rule once adopted would destroy not only the integrity of the instrument itself, but the safety of all proceedings taken under it looking to the acquirement of rights and privileges.

There is no claim of fraud in the negotiations of this treaty. There can be no claim of obscurity or ambiguity in its language. The language of Article IX is plain, clear and explicit and not to be changed by the understanding of individuals first testified to, at the expiration of more than thirty years after its solemn conclusion. No rule of evidence applicable to obscure or ambiguous instruments by which parol evidence is admissible can be invoked in this case.

The circumstances surrounding the conclusion of this treaty point unmistakably to the fact that simply a reservation, in other words, a title such as is held by Indians generally in a reservation, was intended to be created by Article IX of the

treaty. The transaction was a grant to the general Government, with a reservation to one of its grantors. At the date of the conclusion of the treaty the Indian Mon-si-moh was a tribal Indian. He was the Chief of a band of roving tribal Indians, dependent for subsistence upon hunting and fishing in the wild and unsettled portions of this country.

Assuming for the purposes of the argument that any of the testimony of the declarations of Mon-si-moh made at the date of the conclusion of the treaty are admissible, it is apparent that it was not for the purpose of pecuniary emolument but simply the object of having an exclusive country on which to camp and over which he might exercise absolute control as Chief of his band of Indians, was the moving influence with Mon-si-moh in asking for and accepting land instead of monetary consideration for his services in effecting the treaty. That the value of the land as a commercial commodity in no degree entered into his purpose in asking for it, is evidenced by his declaration that he did not want money; that money would be quickly lost or that he would be deprived of it by the superior intelligence of the white man with whom he came in contact, and that his sole purpose was to acquire for himself and his children a place where he might feel that his authority was absolute and supreme and that no interference by others might be anticipated.

The testimony of Alexander Ramsey, one of the Commissioners who negotiated the treaty on the part of the general Government, is that he understood that the land which was set apart to Moose Dung and Red Bear was a reservation. The report of the Commissioners uses the identical language in refering to the reservation for the tribe, that is used in Article IX of the treaty in referring to the Moose Dung reservation; for the Commissioners say in their report, in speaking of the reservation, that it had been set aside for the tribe under the treaty, that some fault had been found by the Indians with "the reservation set apart for them" (see report of Commissioners).

The journal of Mr. Wheelock, who was the secretary of the commission, says that wherever reference was made to this land, either by Moose Dung or anyone else, it was always spoken of as a reservation and treated on that basis.

The treaty itself furnishes the most conclusive internal evidence that only a reservation was intended to be created by Arti-

cle IX in favor of Mon-si-moh. Article VIII of the treaty specifically provides for grants in fee to any individual members of tribes represented in the treaty stipulation. If it had been contemplated that the reservation to Mon-si-moh was to be a grant in fee, it certainly is reasonable that the provisions relative to it should have been contained in Article VIII, and expressed in similar language to that used in such article. The basis for the grants in fee provided for in Article VIII, is the basis which has ever been the policy of the Government to pursue in granting to Indians the fee in lands carved out of the public domain, to-wit: The adoption by the Indians of civilized habits, the laws, the customs and the manners of the whites, and the elevation to citizenship. Every statute of allotment, every provision for grants in fee contained in the various statutes enacted by Congress, all render the adoption of such habits, customs and laws as the preliminary requisite of title in fee to lands so alloted and granted.

See Indian Allotment Statutes:
Elk vs. Wilkins, 112 U. S., 94
State vs. Fraser, 44 N. W., 471.

Whenever the Government has sought to vest title in fee in lands reserved for particular persons in Indian treaties, it has used the word "grant," "fee," or similar expressions, or made, as has been suggested, the adoption by the beneficiary of the habits of civilized life, the prerequisite to the donation of such title.

Doe vs. Beardsley, 2 McLean, 412.
Smythe vs. Henry, 41 Fed., 705.

And the Government has always with the strictest care made provision, where such grants have been made in fee and absolute title vested, that no alienation of such title should be made by the Indian without the approval of the general Government. The superior intelligence of the white man, when influenced by cupidity, has been the object which the federal Government has ever sought to guard the Indians against; and it is but fair to say that had the Government any intention of vesting an absolute title in the reservation specified in Article IX in the Indian Mon-si-Moh, it would at least have suggested in that Article or in some other provision of the treaty, a similar provision looking to the preservation and protection of the Indian's rights.

No better illustration of the wisdom of the policy pursued by the general Government can be found than in the facts of this

case. The lease under which complainants claim, provides for a yearly rental of twenty-five dollars ; while in the case of the Jones Lease, the government after the fullest investigation determined that four hundred dollars per annum was an equitable consideration for the use of the premises in question. The necessity of the exercise by the general Government of the general supervision over tribal Indians which it has always exercised and claimed, finds emphasis in the fact of the execution and procurement of the lease of the respective parties to this action.

For treaties containing such stipulation and evidencing the policy of the federal Government see:

Treaties 1816 and 19 Cherokee Indians.
Treaty October 1st, 1859, Sac and Fox Tribes, (15 U. S. S., 467.)
Treaty June 24, 1862, Ottawa Indians (12 U. S. S., 1238.)
Act of Legislature, N. C., January 2nd, 1847.
Treaty Oct. 6, 1818, Miami Indians.
Treaty Oct. 23, 1826, Miami Indians.
Treaty Oct. 24, 1834, Miami Indians.
Treaty Nov. 6, 1838, Miami Indians.
Treaty Nov. 28, 1840, Miami Indians.
Treaty June 5, 1854, Miami Indians.
Treaty July 29, 1829, Ottawa, Chippewa and Potawatamie Indians.
Treaty June 3, 1825, Kansas Indians.
Treaty January 31, 1855, Wyandot Indians.
Treaty March 7, 1842, Wyandot Indians.
Treaty November 15, 1861, Potawatamie Indians.
Treaty March 24, 1862, Creek Indians.
Treaty July 28, 1862, Chippewa Indians (12 U. S. S., 1239.)
Treaty Nov. 15, 1861, Potawatamie Indians.
Treaty Chippewa and Christian Indians, 12 U. S. S., 1105.

And ample provisions have been made for the subsequent issuance of patents by the general government.

(3.) It is equally well settled that the manner in which the parties to a contract have treated it since its execution and the methods pursued under it will be considered and parole evidence upon this point is admissible.

By the undisputed evidence in this case both the dead and

living Chief Mon-si-moh were and are tribal Indians. By the undisputed evidence in this case it is clear that no acts were done of improvement in the line of farming, of cultivation or in any other manner as evidencing absolute proprietorship or any understanding that the land in question was to be devoted to any other purpose than that peculiar to an Indian reservation.

The fact that Mon-si-moh at one time and while his wife was living, cultivated a garden spot upon this reservation, is no more evidence of civilization or the adoption of civilized habits, than is the fact that every squaw cultivates for every male Indian a garden spot upon every reservation in North America, and has done so by the customs and habits of her tribe from time immemorial.

The living chief has always treated the land in question simply as a reservation. The general government has in like manner always treated it. Every item of evidence in the case wherever it is apparent that the subject of this land has come under the special action of the general government discloses that the government has so regarded and treated this reservation The official map of the general government in evidence has so defined it, and in all laws, correspondence and official acts of the Interior Department evidenced by the Joint Resolution, the approval and promulgation of the Jones Lease, the opinions of the Acting Secretary and the Secretary of the Interior, it has been solely so recognized and treated.

The fact is of the utmost importance in determining the proper construction of Article IX of this treaty.

Coleman vs. Grubb, 23 Pa. St., 393, 409.
Gas Light Co. vs. City of St. Louis, 46 Mo., 121.
Jackson vs. Perrine, 35 N. J. Law, 137.
Stone vs. Clark, 1 Met., 378.
Trustees vs. Ry. Co., 3 McCrary, 455.
Foster vs. Goldschmit, 21 Fed., 70.

And it is equally well settled that where a certain construction and interpretation of treaties has been adopted by the Executive Department that that construction will be followed by the Judicial Department when it is not repugnant to the language or the purpose of the treaty.

Castro vs. De Uriarte, 16 Fed., 93.
Lattimer vs. Poteet, 14 Pet. 15.

U. S. vs. Holliday, 70 U. S., 407.

(4.) The language of Article IX is "there shall be set apart a reservation out of the land ceded." So long as this reservation was to a tribal Indian Chief of a roving band with no hope upon the part of the government expressed of the adoption by him of civilized habits and certainly no expression on his part of any intention so to do, it is clear that no higher title could pass by such language than is ordinarily incidental to reservations to any Indian or Indian tribe; and in establishing reservations, although the government has often used words of perpetuity and heirship, such as would seem to vest in the beneficiaries absolute title, yet such language has always been understood and treated as conveying no more than the right of occupancy and possession with the ultimate title retained in the general government.

Beecher vs. Wetherby, 95 U. S., 517.

U. S. vs. Cook, 19 Wallace, 591.

Ry. Co. vs. U. S., 92 U. S., 733.

The character of the Indian title was long since settled in this country by the supreme court of this United States. That title is simply the right of occupancy and possession. The absolute and ultimate title rests in the sovereign power of the nation, the federal government. In this case an Indian tribe is ceding to the general government whatever title it may have in certain lands. It asks that from the lands so ceded a section may be reserved for one of its members; and the government to whom the cession is being made, accedes to this request. The force of these acts is clearly to retain for the reservee whatever title the grantors possess, no more, no less.

Wheeler vs. Me-shing-go-me-sia, 30 Ind., 402-6.

Godfrey vs. Beardsley, 2 McLean, 412.

It is simply an authorization to hold in severalty. Such a grant cannot separate the Indian from his nation, nor give to him a title which could be judicially distinct from that of his tribe, as it might still be acquired from or ceded by such tribe.

Johnson vs. McIntosh, 8 Wheat., 542.

It is apparent that the construction put upon Article IX of the treaty is as has been hereinbefore stated, the right of possession only in Mon-si-moh and his heirs, with the ultimate fee in the Government, together with the exclusive right to acquire the right of possession from the Indians.

This position has received congressional sanction in Joint

Resolution, approved August 4th, 1894. (Defendant's Exhibit, page 339.) 242 (Defendants Ex 45)

The government is not a party to this proceeding and cannot be bound by the decree. Neither is Mon-si-moh or the other heirs.

This view of the case comports with the request of the Moose Dung at the treaty, viz: A place where he and his children might live forever, a reservation for them. While a strict construction of the language used would limit it to the life of the elder Chief, yet the government has carried out the old Chief's request literally, and allowed his children the same right as himself.

In conclusion therefore, we say the title held by the elder Chief and now held by his heirs, is the right of possession in perpetuity.

So long as any heir of the elder Chief exists and the ultimate fee is in the government, and that no right can be acquired in this land without the consent of the government.

Hence the complainant's lease is invalid and void and defendant's lease is prior and superior to that of the complainants.

II.

THE STATUS OF THE ELDER CHIEF AND HIS HEIRS.

"As the settlement of the country advanced, and as the demands of an increasing population required, the United States adopted the policy of extinguishing as far as possible, the title of the various tribes to the territory in which each respectively claimed a right, and of devoting to each tribe a separate, distinct district or reservation of land, of smaller area, within whose limits it was protected in the enjoyment of a modified or local sovereignty.

Their subjugation and absorption as a mass was not attempted. The tribes continued independent, and individual members were not, in the proper sense, citizens of the United States. While they were subject to the laws of a state when mingling in its population, they were regarded, when living on their own reservations, as subject under certain limitations to their own distinctive jurisprudence, civil and criminal.

While the Indians and the Americans were in theory living under the same dominion, they were in fact, members of different political societies, owing allegiance, primarily, to different

governments. The Americans belonged to one political community, and the Indians to many. But as the whites increased in number and power, and in time enclosed by their settlements the reservations that had been set apart by treaties for the use of the different tribes, and were only prevented from entering and making settlement thereon by an enforcement of those treaties by the government, the Indians became entitled to and relied upon its protection, while owing no allegience thereto. Thus it was that the relation of domestic dependent nations, now held by Indian tribes within the United States to this government arose, and this relation, which has been said to "resemble that of guardian and ward," embraces every tribe within our jurisdiction."

Commissioner of Indian Affairs report, 1891, Vol. 1, Page 2.

The foregoing states very clearly the understanding of the Department of the United States government charged with the immediate care of the Indians.

The guardianship is not limited to the tribes, but to the individual Indians holding tribal relations. By section 8 of article 1 of the Constitution, Congress is given the power to regulate commerce with the Indian tribes. Revised Statutes 1878, page 19.

By section 463, same statutes 78, it is enacted that "the Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations."

By section 2149 the Commissioner is authorized to and required to remove from any tribal reservation any person being therein without authority of law.

Section 2103 requires the approval of the Secretary of the Interior and Commissioner of Indian Affairs to all contracts with Indian tribes or individual Indians such as therein named.

It is true that the particular contract under consideration in this case, does not fall within those specified in this section, and hence the necessity of the Joint Resolution, Exhibit 5. Evidently the Department of the Interior put the Moose Dung grant in the same category with allotted lands and it certainly comes within that category, leases of which are required to be approved by the Department. That is, it is land occupied in

severalty, but the title is held by the Government in trust, hence it comes within the purview of Section 463.

The title to this land and the right of the Indians to make a lease thereof, were raised and passed upon by both the Acting and Secretary of the Interior. Exhibits 6 and 7, Record 249, 269, and 228. 248.

The heirs of the elder Chief are tribal Indians, not citizens of the United States. The laws of Minnesota regulating conveyances can have no force upon lands within the limits of an Indian reservation, nor upon an instrument executed by a tribal Indian not a citizen relative thereto, nor of the registration thereof. No state laws have any force over Indians living upon a reservation and in tribal relations. The constitutional authority vested in Congress to regulate commerce with the Indian tribes—not only authorizes the federal government to legislate, but is an absolute inhibition for the States to legislate. There can be no divided authority in this matter.

The control of Congress over the interest of tribal Indians is exclusive of all state control. To regulate commerce with the tribal Indians is to regulate commerce (intercourse) with the individual Indians of the tribes.

2 Storry Constitution (4th Ed.) Sec. 1097 et seq. and 1933.
Miller on Constitution 469, 401.
U. S. vs. Holliday, 70 U. S., 407.
U. S. vs. Kagama, 118 U. S., 375.
New York Indians, 72 U. S., 761.
Kansas Indians, 72 U. S., 737.
Doyle vs. Irish, 2 Barb., 639.
U. S. vs. Shanks, 15 Minn., 302.
Hastings vs. Farmer, 4 N. Y,, 293.
Cherokee Nation vs. Ga., 5 Peters, 1.
Worcester vs. Ga., 6 Peters, 515.
Wall vs. Williamson, 8 Ala., 48.
Wall vs. Williams, 11 Ala., 826.
Morgan vs. McGhee, 5 Humph., 13.
Boyer vs. Divily, 58 Mo., 510.
Tuton vs. Byrd, 1 Swan., 108.
Jones vs. Laney, 2 Texas, 342.
U. S. vs. Payne, 4 Dill., 389.
State vs. Campbell, 53 Minn., 354.
Foster vs. Commissioners, 7 Minn., 89.

Earle vs. Godley, 43 Minn., 361.
U. S. vs. Thomas, 151, U. S., 577.

The basis of this control is that such Indians are wards of the federal government and touching them and their concerns, the federal government, through Congress, has the exclusive power of legislation and control. The Joint Resolution of Congress authorizing the approval of the Jones Lease, in this case supplies the basis of authority for the action of the Department relative thereto, and at least by implication, forbids any other lease.

Smith vs. Stevens, 77 U. S, 321.

And the fact that the heirs of Mon-si-moh hold this reservation within the limits of the State of Minnesota, in no way gives to them the character of citizenship.

Blair vs. Pathfinder, 2 Yerger, 407.
U. S. vs. Holliday, supra.
U. S. vs. Shanks, supra.
Jackson us. Reynolds, 14 Johns, 335.
Jackson vs. Goddell, 20 Johns, 183.
U. S. vs. Osborne, 6 Sawyer, 406.
Ex parte Reynolds, 5 Dill., 394.

The office of guardian of the Indian tribes and individuals has been exercised by the government for over one hundred years and by the Colonial Governments prior to the organization of the Government of the United States. This, then, has become the settled law of the land and cannot now be disregarded by the courts.

But it will doubtless be claimed by the appellees that this rule was changed by Sec. 6, Chap. 119, 24 Statute, page 388, Act 1887.

But this act has recently received judicial interpretation by the Circuit Court of Appeals of the eighth circuit and of the ninth circuit in

Bells vs. Ross, 64 Fed. 417, and
Beck vs. Flourney, 65 Fed., 30.

There is nothing in the circumstances surrounding the reservee in this treaty, or his heirs, to make this any exception.

They are tribal Indians living on the general reservation of their tribe and receiving annuities from the government and in no manner whatever complying with the terms of this statute.

The government, recognizing its paternal care to support and maintain them, should be granted the right to control their contracts and approve or disapprove them as it has done in this case.

III.

THE AUTHORITY OF THE GOVERNMENT TO CONTROL THE CONTRACT OF THESE HEIRS AFFECTING THE LAND IN QUESTION.

If we are correct in our position that the land in question is a reservation and that these heirs are tribal Indians, it follows that the Government has the power to control their contract made with reference thereto.

It equally follows that the Government has this power, if either of the conditions claimed exists.

There is no conflict of testimony that none of them live upon the land or that they are tribal Indians.

They are each uneducated, roving Indians, living on the general reservation and Government annuitants and belong to a tribe. They each come clearly within the class named in Sec. 2103 of the Revised Statutes, whose contracts are void unless approved by the Government. Can it be that the Government intended that Indians of their character should be allowed to contract regarding their land, and so generally provide for the control of all other Indian contracts?

Certainly not. On the contrary the presumption is that it was intended to leave their contracts to the control of the Interior Department, under the general authority of section 463, Revised Statutes. The Government of the United States is the guardian of the Indian, and any contract entered into by him without the approval of the Government is nugatory and void. As was said in

Cherokee Nation vs. State of Ga., 5 Peters, 1.

"Their relation to the United States resembles that of a ward to his guardian. They look to our Government for protection, rely upon its kindness and its power, appeal to it for relief from their wants, and address the President as their "Great Father."

"As long as they retain their tribal relations they are domestic, dependent communities."

State vs. Campbell, 53 Minn., 355.

Worcester vs. State of Ga., 6 Peters, 515.

"It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the Nation. They are communities dependent on the United States. Dependent, largely, for their daily food, dependent for their political rights.

They owe no allegiance to the States, and receive from them no protection. Because of local ill-feeling, the people of the States where they are found are often their deadliest enemies.

From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection and with it the power. This has always been recognized by the Executive, by Congress and this court, whenever this question has arisen."

U. S. vs. Kagama, 118 U. S., 375-383.
Choctaw Nation vs. U. S., 119 U. S., 1-27.
Cherokee Indians vs. U. S., 117 U. S., 288.

These Indians maintain their tribal relations, and one is an acting Chief, and lives among his people, and Congress by the Joint Resolution,

2 Sess., 1894, Private Acts, 40.

and the Department of the Interior, by its action, have assumed and exercised this power of guardianship in this particular instance.

What stronger argument can be offered for the doctrine laid down in the cases cited, than the facts of this case.

If the Federal Government has power to protect a tribe of Indians, why has it not the right to protect an individual Indian in his rights.

If the contracts of the several tribes are subject to the approval of the Government, why are not the contracts of the individual Indians?

Is there not greater reason for exercising this guardian care over the individual, than over the tribe?

Most certainly it is, and the right to do so is clearly within the authority cited.

We have singled out these last authorities as most clearly presenting the views of the court upon this question.

The general polity of the Government regarding leasing of lands held by Indians in severalty has been manifested in the act of February 28, 1891, 26 Stats. 794, Sec. 3; and in Proviso in Chap. 290, 2 Sess., 1894, page 305, as follows: "That whenever it shall be made to appear to the Secretary of the Interior that by reason of age, disability or inability, allotment of Indian lands, under this or former acts of congress, cannot personally and with benefit to himself, occupy or improve his allotment

or any part thereof; the same may be leased upon such terms, regulations and conditions as shall be prescribed by the Secretary for a term not exceeding five years for farming or grazing purposes, or ten years for mining or business purposes."

The Joint Resolution, Exhibit "5",

2 Sess., 1894, Private Acts, page 40, Res. 41.

supplies the place of these acts, as the defendant's lease is for a period longer than that provided for in these acts.

An examination of the several statutes known as the non-intercouse acts will indicate the general policy of the Government regarding the control of tribal Indians, viz:

Sec. 2110, Revised Statutes 369.

Sec. 5, page 246, Supplement to Revised Statutes.

Chap. 135, page 16, Supplement to Revised Statutes.

Secs. 14, 15, 16, page 167, Supplement to Revised Statutes.

Chapters 3 and 4, Revised Statutes, page 369 and 371.

"In November, 1779, when congress were discussing the conditions of peace to be allowed to the six nations, they resolved that one condition should be, that no land should be sold or ceded by any of the said Indians either *as individuals*, or as a nation, unless by consent of Congress."

Chancellor Kent in Goodsell vs. Jackson, 20 John, 723.

These acts of Congress all show the general policy of the Government to inhibit all dealings with the Indians, except under the supervision of the Government, and clearly by Sec. 2119 the Government has power to protect in case of land set apart in severalty.

By article 3 of the ordinance, for the Government of the territory northwest of the Ohio, Revised statutes of the U. S., 15, it is enacted regarding the Indians, "that laws founded in justice and humanity shall, from time to time, be made for preventing wrongs being done to them, and for preserving peace and friendship with them.

Article 2, of the treaty with the Chippewa and other Indians, of Jan. 21st, 1785, 7 U. S. Statutes at Large, 16, reads as follows: "The said Indian nations do acknowledge themselves and all their tribes to be under the protection of the United States, and of no other sovereign whatsoever."

By article 3 of the treaty of Jan. 9, 1789,

7 U. S. Statutes at Large, 28.

it is provided, wherein certain lands are given the Indians,

among whom are the Chippewas; "But the said nations or either of them, shall not be at liberty to sell or dispose of the same, or any part thereof, to any sovereign power except the United States, nor to the subjects or citizens of the United States."

This is again repeated with more particularity in article 5 of the treaty of August 3, 1795.

7 U. S. Statutes at Large, 49.

"And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever."

And again in the treaty of July 4th, 1805:

7 U. S. Statutes at Large, 87.

And the treaty of Nov. 17th, 1807:

7 U. S. Statutes at Large, 105.

And by Article 5 of the treaty of November 25th, 1808:

7 U. S. Statutes at Large, 113.

It is further agreed that "the United States on their part do renew their covenant to extend protection to them according to the intent and meaning of stipulations in former treaties."

In the treaty of September 24th, 1818, 7 S. at Large, 203, we find reservations were made, and in the treaty of August 29th, 1821, 7 U. S. Statutes at Large, 218, grants were made, and again in the treaty of July 29th, 1829, 7 U. S. Statutes at Large, 320. And in the treaty of September 26th, 1833, 7 S. at Large, 431, we find the further provision regarding the grants of July 29th, 1829, found on pages 327 and 378 of 7 Statutes at Large, wherein it was found necessary to make the grants in fee.

We have called attention to these several treaties to show the relation sustained by and course of dealing between these Indians and the Government of the United States, which amounts to contract relations, wherein the Government promises protection and the Indians obedience, and for the further purpose of illustrating the construction put upon the word "reservation" as used in these treaties by the treaty making power.

By Sec. 4, Act of July 22, 1790, 1 S. L., 138, purchases from "any Indians, or any nation or tribe of Indians" is inhibited, unless under authority of the United States. By Sec. 7 this act expired in two years.

By Sec. 12, Act of May 19, 1796, 1 S. L., 472, it is enacted "That no purchase, grant, lease or other conveyance of lands,

or any title or claim thereto, from an Indian or nation or tribe of Indians within the bounds of the United States, shall be of any validity in law or equity" unless entered into by treaty or convention under the Constitution or authority of the United States.

By Sec. 22 this act expired in two years.

By Sec. 12, Act of March 3rd, 1799, 1 S. L., 746. This last act was re-enacted, and by Sec. 21 it continued in force for three years.

Sec. 12 of the Act of March 30th, 1802, re-enacts this Sec. 12, and there is no limitation as in previous acts, and it remained the law until the act of June 30th, 1834, where Sec. 12 of which contains the same language except the one word "or." Note the difference. Sec. 12 of March 30th, 1802, 2 S. L., 143; "That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian *or* nation or tribe of Indians," etc.

Sec. 12 of June 30th, 1834, 4 S. L., 730; "That no purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation, or tribe of Indians," etc. We find it to be in the omission of the word "or" italicized above.

It had remained the settled policy of the Government, as manifested through its legislative acts for more than half a century, to inhibit the purchase of lands from an individual Indian, and the only manifestation we have of a change of policy is in the omission of this one word, which more probably arose from an omission in transcribing, than otherwise.

To omit the word *or*, italicized above, and insert a comma makes the same meaning as with the word *or* inserted.

What fact or circumstance had arisen to make so radical a change in the attitude of the Government toward these people as it would be if the contracts of individual Indians were to be placed beyond the supervision of the Government? Their condition had not so changed nor had the time arrived when the Government could emancipate them.

But *leases* and *purchases* from Indian Nations are clearly inhibited. This inhibits purchases from the individuals of those nations, except it be with the consent of the Government, and under its supervision.

Goodell vs. Johnson, 20 Johns, 293,

had then been decided in which Chancellor Kind had said:

"According to that rule, then a prohibition to purchase from the Indians included a prohibition to purchase from any of the Indians; and what comentary can make it plainer." "We ought to give to the words the sense most suitable to the subject matter, and construe them largely and equitably in favor of the Indians, for whose protection they were intended."

And within all the decisions that where an act is prohibited between nations it applies to the individuals of those nations this is prohibatory of leases and purchases from individual Indians. "To regulate commerce is to prescribe the title by which commerce is to be governed."

Gibbons vs. Ogden, 9 Wheaton, 1.

U. S. vs. Halliday, 3 Wall, 407.

On July 9th, 1832, there was passed "An act to provide for the appointment of a Commissioner of Indian Affairs and for other purposes," 4 S. L., 564, "who shall, under the direction of the Secretary of War and agreeably to such regulations as the President may, from time to time prescribe, have the direction and management of *all Indian affairs and all matters arising out of Indian relations.*"

This is Sections 462 and 463 of the Revised Statutes.

Does then the omission of the word *or* from the Act of 1834 lead the court to the conclusion that the Government had, on mature deliberation, decided to withdraw its guardian care from the individual Indian and yet continue it over the Indian tribes and Nations?.

If not, then the foregoing furnishes an abundance of authority for the action of the Department in this transaction, and with the resolution of congress there remains no doubt that appellees' lease never had any vitality and was a mere nullity from its inception and gave them no rights in the premises whatever.

Aside from all statute and usage of the Department, it is a treaty obligation resting upon the Government to protect these Indians and each of them in their rights.

U. S. vs. Mullen, 71 Fed., 682.

U. S. vs. Flourney, 71 Fed., 576.

In conclusion we invite the courts attention especially to

Sec. 2116 Revised Statutes U. S., 369.

and to the opinion of Chief Justice Marshall in

Johnson vs. McIntosh, 8 Wheaton, 548.

And the opinion of Chancellor Kent in

Goodsell vs. Jackson, 20 Johns., 693.

and also to the cases of

Godfrey vs. Beardsly, 2 McLean, 412.
Wheeler vs. Me-shing-go-me-sia, 30 Ind., 402-6.
U. S. vs. Shank, 15 Minn., 369 (Gil. 302).
Beck vs. Flourney, 65 Fed., 30.
Eells vs. Ross, 64 Fed., 417.
U. S. vs. Boyd., 68 Fed., 577.
Breoux vs. Johns, 4 Ga. St., 141; 50 Am. Dic., 555.

From the foregoing we deduce the following propositions:

First: That a reservation for the use of an Indian does not create a fee title in the land reserved without further words of grant.

Second: That the Government is the guardian of the Indians, and may annul his contract when it is unjust and oppressive, and against the interest of the Indians.

Third: That the court will follow the construction put upon the contracts and treaties made by and with the Indians, and the course pursued by the political divisions of the Government in the care and control of the Indians.

Fourth: That until approved by the Government the contract of an Indian is not binding and may be annulled.

Fifth: That, notwithstanding the Indian may be the owner in fee of land and exercise the right of citizenship in a state, the Government may exercise its guardian care over him.

Sixth: That this guardianship extends to the individual and is not limited to the tribal aggregate.

Seventh: That the land in question is set apart and held for the use of tribal Indians and is under the control of the Government, and no person has a right thereon except by the permission and consent of the Government, it being a reservation and subject to the same statutes, rules and regulations as a general reservation for the tribe of Indians.

Eighth: That the Government has so treated it and the court will adhere to the construction rules and practice of the Department in dealing with the Indians and their property rights.

IV

THE EQUITIES OF THIS CASE.

The appellees claim under the lease, Exhibits A, B and C (Record 112), procured under the circumstances and conditions narrated by Wells (R. 194, *et. seq.*), and Mon-si-moh

223, 250

(R. 210, *et. seq.*), and La Bessodiere (R. 216, *et. seq.*).

An inspection of the document discloses that it contains no agreement or covenant to be performed by the appellees except "the said parties of the second part agree, at the end of the term of this lease, to quietly surrender possession of said premises unto the said first party, his heirs or assigns;" but the lease is not signed by the appellees and they had never taken possession of the leased premises until after the making and approval of the appellant's lease, and the going upon the land by appellant and staking out the location of his mill, when the appellees built a house partly on the land and partly over the water and put the barbed wire fence along the shore.

But this, we submit, was not such a use as comes within the uses limited within the lease as expressed therein, "intending thereby to convey all shore rights for the time of this lease for lumbering purposes." The thing purporting to be leased is "ten feet wide off the bank of the Red Lake River and Thief River along the waters edge," which is the entire water front of the reservation, of which appellant's lease includes but a small portion.

Lot 1, the land described in appellant's lease, comprises about thirty-one (31) acres of land, for the use of which appellant is paying four hundred dollars ($400.00) per annum and its chief value is the water front or riparian privileges. The appellees had made no use of it whatever. They had driven some piles in the river thirty feet off the shore and run their logs on the further side of the piles, hence coming nowhere near this shore. In view of all these facts and circumstances, can it be doubted that the appellees procured this apparent lease from the Indian for the express purpose and none other, of obstructing the location of a mill there, the product of which would come in competition with their plant, and looking into the future saw the advantages to be derived, and taking advantage of this uneducated, half-starved Indian, procured his signature to the paper, as hereinbefore referred to?

Here is an illustration of the superior sagacity of the white man over the ignorant, half-clad, hungry Indian. Had the lease, at the date of its execution, been submitted to the Interior Department upon the same terms that appellant's was, would not that office have discovered the value of the right sought? Most certainly they would.

Do not these facts and circumstances show most conclusively, as Chancellor Kent said in Goodell vs. Jackson, 20 Johns.,

718: "That an Indian, in his individual capacity, was in a great degree *inops concilii*, and unfit to make contracts, unless with the consent and under the protection of a civil magistrate."

What counsel and advise did Mon-si-moh have in making the contract with appellees? That of Wells, who could do no better than to work as a farm hand on a reservation 100 miles from civilization, and live with a squaw. Again says Chancellor Kent, at page 726: "Frauds are much more likely to happen in contracting with a single, half-naked, unsheltered and unprotected Indian, than with an assembly of grave Chiefs, distinguished not only for valor in war, but for wisdom in council. The Constitution might also be easily evaded, upon this construction, by procuring a sale from the tribe to the individual, and then a sale from the individual to the whites."

The appellees come to the court of equity and ask that this contract be held valid and binding, when if the day after the decree is entered they may remove their hut and barbed wire fence and when the Indian calls for his $25.00 annual rental, say to him, "we no longer occupy your land and owe you nothing," and when the Indian comes with his suit to the court, be told: "The defendants never promised you any thing and you cannot compel them to pay you if they do not choose to occupy your land." Indeed would the poor Indian conclude that he was *inops concilii* when he made a contract which prevented him from receiving $400.00 per annum, but which did not bind the other party to pay the $25.00 per annum which he had agreed to accept.

The appellees' lease is void for want of mutuality. It is not executed by the lessees and contains no covenant binding on them. The appellees have not agreed to occupy and pay rent and had not, at the date of appellant's lease, nor at the date appellant took possession, taken possession, and they are therefore at liberty to vacate and are not bound to pay rent.

Contracts containing mutual covenants must be executed by both parties, and if not so executed are void.

Tewksbury vs. O'Connell, 21 Cal., 61.
Wade vs. Newburn, 77 N. C., 460.
Laughran vs. Smith, 75 N. Y., 205.
Clemens vs. Broomfield, 19 Mo., 118.
Castro vs. Gaffey, 96 Cal., 421.
Barber vs. Burrows, 51 Cal., 404.
Livingston vs. Rogers, 1 Caines, 583.

Townsend vs. Corning, 23 Wend., 435.

The lease is void for uncertainty. The bill claims "ten feet on and along the shore," but the lease attempts to describe some right in "ten feet off the bank for the handling and storing logs."

The Red Lake River is a meandered stream and navigable for vessels of many tons burden.

The shore owner could only use the water for the purpose of landing from or going upon the navigable waters, and could not obstruct the right to the use of the waters by the public. Hence, any use the appellees might make of the water leased must be subservient to the public use.

Yates vs. Milwaukee, 10 Wallace, 497.
Schuemier vs. Railroad Co., 7 Wallace, 272.

It clearly appears that the appellees can not claim ten feet on the shore under the description in this so-called lease, and if defendant has a lease of lot one (1), he has a right to an equal use of the public waters, to bring his logs to his mill, and complainants cannot prevent him from bringing them over and along the public waters and detaining them a sufficient and reasonable time to land them. Hence, their supposed right becomes intangible and valueless. The use is limited to storing and handling logs. They have the right to handle logs on the public waters and the lessor could give them no right to store logs in public waters. The principles here contended for are too well established to need authority to support them.

The claim of the appellees is wholly without equity. They ask this court to decree to them under this lease the right to the use of the entire water front along the Moose Dung reservation, so-called, for which they have never bound themselves to pay anything but the nominal sum of twenty-five dollars per annum, and enjoined appellant from using one fifth of it, thereby depriving the lessor of the rental of $400.00 a year.

No possession had been taken or use made of this right, until after the approval by the Department of the lease to the defendent. The allegations in the bill of improvements and the use, are shown to be false, and the only improvements, a shanty, not compatible with the use named in the lease, and for colorable purposes only.

Hence, it follows that the appellees have no right in the shore, their only right is the use of the water which is sub-

servient to the public use, and defendant has the right to use the waters equally with the appellees.

But the appellees can claim under their lease only one-sixth of the whole. Granting for the purposes of an argument, that the title of the elder Chief and his heirs is a fee and that the act of Congress has conferred upon them citizenship, the appellees have only one-sixth and defendant five-sixths, and it is the subject of partition only.

And the five heirs not joining in the first lease, have, with full knowledge of the acts of Mon-si-moh, accepted the rent, and have ratified the acts of Mon-si-moh, and the Government in their lease (Defendant's Exhibit 17). And the Government has approved the lease since this record was made up.

The case would then stand at the commencement of this action with appellees having a lease of one-sixth of the water privileges to store logs, and defendant with five-sixths and lot one (1).

By the lease, appellant's exhibit 17, the other five heirs and Mon-si-moh have leased to appellant the remaining five-sixths, which carries with it the use of five-sixths of the water rights.

Hence, it follows that appellees, under their lease, can claim no more than one-fifth, and the decree must be accordingly.

This then leaves only the contention over one-fifth of the shore right dependent upon the question of title under the treaty.

The execution of the lease to defendant by the five heirs of the elder Chief, Exhibit 17, R, has been set up by supplement-answer. This is proper.

"A supplemental answer is filed to bring to the attention of the court some fact which was not inserted in the original through mistake or ignorance, or which has occured subsequently to the filing of the same."

Foster's Federal Practice. 228, Sec. 154.
Caster vs. Wood, 1 Baldwin, 289.
Smith vs. Babcock, 3 Sumner, 583.
Kelsey vs. Hobby, 16 Peters, 269-276.

In this last case the court said: "This brings us to examine the release and the account stated at the time it was given. Some objections have been made as to the manner in which the release was introduced into the proceedings. It was filed in the cause and a motion therefor made to dismiss the bill; and it is said, that being executed while the suit was pending, and

after the answers were in and the account before the master, it could have been brought before the court by cross-bill or supplemental answer, and could not, in that stage of the proceedings, be noticed by the court in any other way. It is sufficient answer to this objection, to say, that it was admitted in evidence without exception, and both parties treated it as properly in the cause; and the complainant proceeded to take testimony to show that it was obtained from him by duress, and the defendant's to show that it was freely and volintarily given. It had the same effect that it would have had upon a cross-bill or supplemental answer, and the complainant had the same opportunity of impeaching it. And there is no propriety in requiring technical and formal proceedings, when they tend to embarras and delay the administration of justice; unless they are required by some fixed principles of equity, law or practice, which the court would not be at liberty to disregard."

An application to file a supplemental answer is in the discretion of the court.

Caster vs. Wood, 1 Baldwin, 289.

Smith vs. Babcock, 3 Sumner, 583.

In

Hardon vs. Boyd, 193 U. S., 756-791.

the court said: "In reference to amendment of equity pleadings, the courts have found it impracticable to lay down a rule that would govern all cases. Their allowance must at every stage of the cause rest in the descretion of the court, and that descretion must depend largely on the special circumstances of each case."

The appellees are estoped from claiming anything under their lease as against the appellant for the reason that they set by and let him procure his lease and expend money in procuring the approval thereof, and themselves procured and sought the approval of another lease subsequent to appellant's lease and not until they had been defeated in this effort did they make any claim under this lease.

This lease of appellees was never filed or recorded in the office of the Csmmissioner of Indian Affairs.

Such lease may be there recorded.

Act July 26, 1892, 27 Statutes 372, 2 Sup., 51.

If we are correct in our position that this is a reservation, then the recording of this lease in Polk county was not constructive notice to appellant.

The complainants knew that appellant was negotiating for a lease (R. 177 and 184) and never mentioned that they had the lease in question.

The rule is "That where one by his words or conduct wilfully causes another to believe the existence of a certain state of thing, and induces him to act on that belief so as to alter his previous position, the former is conluded from avering against the latter a different state of things as existing at the same time."

Bigelow on Estopped. 249.

"It proceeds upon the ground that he who has been silent as to his alleged right when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent."

U. S. Bank, vs. Lee, 13 Peters, 110.

Morgan vs. R. R. Co., 96 U. S., 716-720.

He is not permitted to deny a state of things, which by his culpable silence or misrepresentations, he had led another to believe exists, and who acted accordingly upon that belief.

Merchants Bank vs. State Bank, 10 Wallace, 604-645.

A person who stands by and permits property to be sold and does not give notice of a claim of lien is estopped, notwithstanding his incumbrance is matter of public record under Registry laws.

Markham vs. O'Conor, 52 Ga., 183-199.

We submit that the decree is erroneous and should be reversed and a decree entered that the appellees bill be dismissed, with costs of both courts to appellant.

Respectfully submitted,

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United States of America.

Supreme Court.

RAY W. JONES,

Appellant,

vs.

PATRICK MEEHAN AND JAMES MEEHAN,

Respondents.

Appellant's Supplemental Brief.

JAMES A. KELLOGG,

Counsel for Appellant.

UNITED STATES OF AMERICA.

Supreme Court.

RAY W. JONES,

Appellant,

vs.

PATRICK MEEHAN AND JAMES MEEHAN,

Respondents.

SUPPLEMENTAL BRIEF FOR APPELLANT.

The brief on file was prepared for the court of appeals, and further research has brought to my attention the following.

For statement of the case see brief heretofore filed.

The purpose of this brief is to discuss the status of the land described in the amended bill of complaint and answer thereto (Rec. pp. 1-9), and the title of the heirs of the original reservee in and to the same, as set forth in the assignments of error numbers IV, V, VI, VII, VIII, IX and X, to-wit:

IV.

That the court erred in finding that article IX of the treaty of October 2d, 1863, between the United States and the Red Lake and Pembina bands of Chippewa Indians, gave to the Indian Mon-si-moh such a title or interest in the selected lands as vested in Mon-si-moh such a title that he could and did execute a valid lease of the strip in controversy to complainants, and that the approval of the secretary of the interior

was not necessary and gave no additional force to the lease.

V.

That the court erred in finding that the lease of November 9, 1891, by Mon-si-moh to the complainants was and is a valid and subsisting demise of the land covered thereby, and that the rights and privileges therein contained should be vested and quieted in them as against the claims of the defendant.

VI.

That the court erred in ordering a decree for the complainants.

VII.

That the court erred in not ordering a decree that the lease to defendant, approved by the government of the United States conveys rights superior to those conveyed under the lease to complainants.

VIII.

That the court erred in not finding that the title held by Mon-si-moh to the land in question is a reservation of an Indian and under control of the government of the United States, and that any lease made by the Indian Mon-si-moh without the approval of the government of the United States is inoperative and void, and conveys no rights to the lessee.

IX.

That the court erred in giving judgment for the complainant.

X.

That the court erred in not giving judgment for the defendant.

ARGUMENT.

The right to the possession of the land they occupy is in the Indian and the fee in the United States.

Beecher vs. Wetherby, 95 U. S. 525, and cases there cited.

And when a reservation is made to a tribe of Indians they have only the right of possession, and when a reservation is made to an individual Indian this is the right reserved, and hence, in this case, this is the only right of the Indian Monsimoh to the land in question.

The treatment of the Indian is a question of governmental policy and has always been recognized by this court from the foundation of the government.

Beecher vs. Wetherby, 95 U. S. 525, and cases cited.

Public grants are to be construed strictly, and nothing passes by implication.

Rice vs. Minnesota & N. W. R. R. Co., 1 Black, 358;

and where a statute operates as a grant of public property to an individual or the relinquishment of a public interest, that construction should be adopted which will support the claim of the government rather than that of the individual.

Slidell vs. Grandjean, 111 U. S. 412.

So that even if the 9th article of the Chippewa treaty operated as held by the court below as a grant to Mon-si-moh, which the appellant denies, the court erred in holding that such grant was a fee simple, as there are no words of perpetuity or inheritance used in the treaty making the reservation.

The language of the treaty is as follows:

"Article 9. Upon the urgent request of the In-

dians, parties to this treaty, there shall be set apart from the tract hereby ceded a reservation of (640) six hundred and forty acres near the mouth of Thief river for the 'Chief Moose Dung,' and a like reservation of (640) six hundred and forty acres for the chief 'Red Bear,' on the north side of the Pembina river."

There is nothing in the language used in this article to indicate an intention on the part of the United States to add its title, which is the fee, to the title of the Indian tribe, which is the right of occupancy, for the benefit of the Indian chiefs mentioned.

There seems to be small ground for contention in the light of the well known policy of the government of the United States in dealing with Indians that any right passed by this reservation for these chiefs greater than the Indian right of occupancy.

As early as September 20, 1833, the attorney-general of the United States had given it as his opinion in the case of reservations to certain Indians contained in the Pottawatomie treaty of October 20, 1832 (7 Stats., 378), that where by treaty the Indians had ceded a tract of country to the United States in the first article and in the second article reserved from the cession large quantities of land in favor of certain individual Indians named therein, the reservations are excepted out of the cession made by the treaty and do not pass by such cession, and that consequently the title to these reservations remained as it had been before the treaty; that is to say, the reservations were still held under the original Indian title.

He also held in that opinion that as the character of the title to the reservations could not be affected by a grant which did not embrace them and from the operations of which they were in express terms ex-

cepted, and as said reservations were still held under the original Indian title, the Indian occupants could not convey them to individuals and no valid cession of their interests could be made but to the United States.

2 Opinions Attorney-General, page 587.

Following this opinion the executive department of the government having control of Indian affairs has repeatedly from time to time expressed the decision, as occasion arose, that where reservations have been made in treaties for individual members of the tribes parties thereto, without any expressed provision for the issuance of patents or without stipulating for a greater estate, the Indian reservee could take only the original Indian right of occupancy and would have no right to make any valid conveyance or lease of such reservations without the consent of the government of the United States given in a lawful manner.

The records of the Indian office give exhibition of this understanding, by the executive department having control of the Indians, of the effect of treaties making reservations for individual Indians, and it is but a fair conclusion that when the president transmitted this treaty to the senate for its advice concerning the ratification thereof, he understood that the reservations in the ninth article for the two chiefs were of the usufructuary or occupancy right of the Indian tribe only.

It is a well established rule followed by the courts in all cases, that where a law is construed by the executive department having charge of its execution, that construction will not be overruled by the courts unless there be cogent reasons therefor.

Railroad Company vs. Whitney, 132 U. S. 357.

Sturr vs. Buck, 133 U. S 541, 548.

Eells vs. Ross, 64 Fed. Rep. 417.

In a letter dated April 4, 1842, the commissioner of Indian affairs, Mr. T. Hartley Crawford, to Mr. Lewis Benedict, stated that the department had acted on the opinion of the attorney-general of 1833, above cited, and in accordance with that opinion with reference to reservations made for individual occupancy in Indian treaties as follows:

"War Department,
Office of Indian Affairs.
4th April, 1842.

Lewis Benedict,
Albany, N. Y.:

Sir: The secretary of war has referred to me your letter to him of 21st ult., in relation to the reservation provided for Ah-he-te-ke-zhick, by the 2nd article of the treaty of 20 Oct. 1832, with the Pottawatomie tribe of Indians of the Prairie and Kankakee.

This department has heretofore acted and still acts on the opinion of the attorney-general U. S., expressed in 1833, that the reservations made under the aforesaid treaty were 'excepted out of the grant made by the treaty, and did not therefore pass by it,' and that as a consequence, 'the title remains as before the treaty, that is to say, the lands reserved are still held under the original Indian title,' and cannot be conveyed but to the United States.

In some instances congress has relinquished the reversionary interest of the U. S. to certain persons named in the laws (see private acts, chap. 2, approved 18 Feby., '41), and their claims by deed have been confirmed; but in the case you name no such action has been had.

T. HARTLEY CRAWFORD,
Commissioner."

The provision of article 2 of the treaty of October 20, 1832, referred to in this letter, is as follows: "From "the cessions aforesaid the following tracts shall be re- "served, to-wit," &c.

By the 6th article of the treaty with the Kansas or Kaw Indians of June 3, 1825, (7 Stats., 244), reservations were made for the benefit of individual Indians as follows: "From the lands above ceded to the "United States there shall be made the following reser- "vations of one mile square for each of the half-breeds "of the Kansas Nation, viz," &c.

The construction of that provision of treaty is shown by letter from the commissioner of Indian affairs, dated July 28, 1845, to E. H. Morton, Esq., as follows:

"Department of Interior,
Office of Indian Affairs.
July 28, 1854.

E. H. Morton, Esq.,
Platte City, Mo.:

Sir: I have received by reference from the secretary of the interior your letter of the 6th instant.

In regard to your enquiries, I have to state that this department has held that under the 6th article of the Kansas treaty of 1825, the Indians therein provided for have only a usufructuary interest in the lands set apart for their use and of course the Indian title must be extinguished before they can be subjected to settlement or sale as public lands.

GEO. W. MANYPENNY,
Commissioner."

Also by a letter of April 5, 1856, from the commis-

sioner of Indian affairs to E. Hoagland, Esq., as follows:

"Department of Interior,
Office of Indian Affairs,
April 5, 1856.

E. Hoagland, Esq.,
Tecumseh, Kans. Ty.:

Sir: I have received your letter of the 17th ultimo, with its enclosures, which was referred to this office by the secretary of the interior for answer.

The object of your letter seems to be to ascertain how you can acquire a title to a section or a section and a half of land belonging to the half-breeds of the Kanzas tribe, on the north side of the Kanzas river, to enable you to construct a bridge across the Kanzas at or near the town of Tecumseh, in Kanzas Territory.

This department has uniformly held that the persons for whom reservations of land were made by the Kanzas treaty of 1825, had only a usufructuary interest in the same, and therefore could not alienate their reserves. This being the case, I must say, in reply to your inquiries, that I know of no way in which you can acquire a valid title to any portion of these half-breed lands.

GEO. W. MANYPENNY,
Commissioner."

From a letter dated October 5, 1864, is quoted the following, showing the usual construction by the executive departments at that time of provisions of treaty granting lands to Indians. The treaty referred to was that of 1832, with the Kaskaskia and other tribes (7 Stats., 403), and provided as follows, concern-

ing the reservations affected by said letter: "The Kas-
"kaskia tribe of Indians and the several bands united
"with them as aforesaid cede * * * the lands granted
"to them forever by the first section of the treaty of
"Vincennes of the 13th of August, 1803, reserving,
"however, to Ellen Decoigne, the daughter of their
"late chief, who has married a white man, the tract
"of about 350 acres near the town of Kaskaskia, which
"was secured to said tribe by the act of congress of 3d
"March, 1793," to-wit:

"Department of the Interior,
Office of Indian Affairs.
Oct. 5, 1864.

Col. Jonathan Crums,
Momence, Ills.:

Sir: Your communication of the 28th ult., asking for information in regard to a section of land reserved for Francois Dequindre, under Pottawatomie treaty of 1826, also in regard to deed for approval in this office from Ellen Decoigne, Kaskaskia Indian; and also in regard to the deed from Joseph Ouilmett, is received.

* * * * * * * *

In reply to your second inquiry, I have to say, that there appears to be no evidence in this office that Ellen Decoigne has conveyed away by deed the reserve made for her by the treaty of Oct. 29, 1832; at least there is no evidence that such deed, if made, was presented to this office for approval, and in answer to your verbal inquiry when here, which was noted on the margin of your letter in pencil, as to whether the approval of the president of a deed of conveyance by said Ellen Decoigne would be necessary to make a valid sale, I would say that it is the opinion of this

office that it would; as the fee simple is not expressly vested in said reservee by the language of the treaty, which is usually the case, when so intended.

* * * * * * * *

JAMES STEELE,
Acting Comr."

The provision of the act of March 3, 1791 (the reference to the act of March 3, 1793, appears to be a mistake), is contained in a proviso to section 6 of said act as follows: "No claim founded upon purchase, or "otherwise shall be admitted within a tract of land "heretofore occupied by the Kaskaskia Nation of In-"dians and including their village, which is hereby ap-"propriated to the use of said Indians."

The expression of the construction by the interior department of the provisions of the Chippewa treaty of 1863, making reservation for the Chippewa chiefs named in the 9th article thereof, was expressed in letters from this office to the secretary of the interior and to others, in which the Red Bear reservation was discussed as follows:

Department of the Interior,
Office of Indian Affairs.
March 25, 1882.

The Honorable the Secretary of the Interior:

Sir: Referring to my communication to you of the 23d instant, relative to the request of E. McMurtrie, to be furnished with certain information regarding the reservation directed to be set apart for the chief, Red Bear, I have to add, in reply to his inquiry, that the

lands allotted to the heir of Red Bear cannot be alienated, no patent having been issued therefor.

Very respectfully,
Your obedient servant,
H. PRICE,
Commissioner."

"Department of the Interior,
Office of Indian Affairs,
March 25th, 1882.

The Honorable the Secretary of the Interior:

Sir: I have the honor to acknowledge the receipt, by department reference for report, of the letter of Hon. Thad. C. Pound, chairman of the House Committee on Public Lands, dated the 10th instant, in which he encloses copy of House Bill No. 4633, to authorize the Commissioner of the General Land Office to issue a patent to the heir of Red Bear, and asks the views of the Department thereon.

The ninth article of the treaty between the United States and the Red Lake and Pembina bands of Chippewa Indians, concluded October 2, 1863 (13 Stats., 669), provided that there should be set apart a reservation of six hundred and forty acres for the chief, Red Bear, on the north side of the Pembina river.

Under said authority there was allotted to Tib-ish-co-ge-shig, heir to Red Bear, the east half of section seven and west half of section eight, township one hundred and sixty-three, range fifty-six, in the territory of Dakota. This allotment was recommended by this office on the 17th of March, 1880, and approved by the Commissioner of the General Land Office November 10, 1880.

As the treaty does not provide for the issuing of a

patent, the enactment of a law authorizing such issue is necessary to give the allottee title to the land in question. I think, however, that the patent should contain the usual restrictions as to alienation, incumbrance, etc., for the protection of the patentee.

I therefore respectfully recommend that the following proviso be added to the bill: 'Provided, that the 'land so patented shall not be subject to alienation or 'to lease or incumbrance, either by voluntary con- 'veyance or by the judgment, order or decree of any 'court, or subject to taxation of any character, but 'shall be and remain inalienable, and not subject to 'taxation, lien or incumbrance for the period of fifteen 'years from the date of the patent, which said restric- 'tions shall be incorporated in the patent when issued. 'And if any conveyance shall be made of the land pat- 'ented before the expiration of the time above men- 'tioned, the contract shall be absolutely null and void.'

I return the bill herewith.

Very respectfully,
Your obedient servant,
H. PRICE,
Commissioner."

"Department of the Interior,
Office of Indian Affairs,
July 31st, 1883.

Henry A. Mayo, Esq.,
Walhalla, Dakota.

Sir: I am in receipt, by reference from the General Land Office, of your communication dated July 12, 1883, in which you state that by the treaty between the United States and the Chippewa Indians, conclud-

ed October 2, 1863 (13 Stats., 667), a tract of 640 acres was set apart to Chief Red Bear, and that the following lands are so reserved: The W½ Sec. 8 and E½ Sec. 7, T. 163, R. 56.

You ask if the heirs of Chief Red Bear can sell and give good title to the same, or if they can execute a valid lease for a term of years.

In reply I have to state that under the authority of article nine of said treaty the lands above described were allotted to Tib-ish-co-ge-shig, heir of Red Bear, November 10, 1880.

As the treaty does not provide for the issuing of a patent, the enactment of law authorizing such issue is necessary to give the allottee title to the land in question, and this office, on the 25th of March, 1882, recommended the passage of a bill by Congress authorizing the issuance of a patent with a clause providing that the land to be patented should not be subject to alienation or to lease or incumbrance for a period of fifteen years from date of said patent. This bill failed of passage.

The heirs of Red Bear, therefore, cannot convey title to, or lease, the land in question.

It is now understood that there are other heirs than Tib-ish-co-ge-shig.

Very respectfully,
H. PRICE,
Commissioner."

It will be observed that the War Department, while the supervision of Indian affairs was in that department, and the Interior Department, since 1849, when the Indian office was transferred to that department, has held uniformly since 1833 that the reservation of

land in a treaty to be selected on the lands ceded by said treaty for the benefit of individual members of the tribe making the cession operated as an exception of the land to be reserved from the cession and the continuance of the Indian title in said lands without the right of alienation except to the United States, unless in the language of the treaty making the reservation words be used to indicate a clear intention on the part of the contracting parties that the Government of the United States will add to the Indian occupancy right its fee simple to complete the title in the reserve. This was the position of the Interior Department with respect to naked reservations, as was the case of these chiefs at the time the treaty of 1863 was negotiated, and it is not to be supposed that when the officers of the United States, who were officers of the Interior Department, under instructions from that department and reported to that department, agreed with the Chippewas of the Red Lake and Pembina bands, at their urgent request, to set apart out of the land ceded two reservations for the chiefs named, it was understood by them that these reservations would be held by these chiefs by any greater right than the right always recognized by the Interior Department as passed by the language used, viz., the right of occupancy.

There is further evidence of the intention of the government with respect to these reservations contained in the resolution of the Senate ratifying the treaty with amendments. It will be observed that one of the amendments inserted by the Senate is to article 8 of the treaty, providing for grants of land to male adult half-breeeds or mixed-bloods, relatives of the Indians parties to said treaty.

Attention is first invited to the word used in article 8, which is "grant," and also to the fact that article 8 provides for the granting of lands to the half-breeds and mixed-bloods only where they have adopted the habits and customs of civilized life and are citizens of the United States.

By the amendment of the Senate above referred to it will be observed that provision is made that no patent shall issue even in the case of these grants until due proof of five years actual residence and cultivation, as required by the homestead laws of the United States shall have been made.

In article 8, the term used is "grant;" in article 9, the term is "set apart * * * a reservation." It is very clear that a distinction was intended to be made by the contracting parties to this treaty, between the lands granted to the half-breeds and mixed-bloods, and the lands reserved for the two chiefs named.

Again referring to the reservations made in the Pottawatomie Treaty, in 1832, attention is invited to the fact that congress deemed it necessary in 1848, to add to said reservations the fee by Act of May 26th, of that year (9 Stats., 213), because of the fact that the reservees under the treaty took only the usufructuary title which was inalienable except to the United States.

Attention is invited to the fact that in negotiating a treaty with the Pottawatomie Indians in 1861, (12 Stats., 1191) provision was made for allotment of lands to the Pottawatomies, which were made inalienable except to the United States or members of the tribe, unless by a provision of said treaty, the allottee should in accordance therewith become naturalized by proceedings in a court of justice a citizen of the United

States, when his allotment should be then patented to him in fee simple.

Article 2, of the Shawnee Treaty of 1854, provided for the reservation of lands for individual Shawnees, and it is provided in article 9 "that congress may hereafter provide for the issuance to such of the Shawnees as may make separate selections patents for the same with such guards and restrictions as may seem advisable for their protection therein." (10 Stats., 1053.)

Numerous other treaties were made prior to and about the time of the treaty of 1863 with the Chippewas of Red Lake and Pembina bands, in which provision was made for reserving tracts for individuals, and in no case was provision made by such treaties giving to the parties who were designated as reservees the right without restriction of alienation of the reserves, but where it was intended that the Indians should ultimately have the fee in the land, provision was made for the granting of the fee either by act of Congress, when Congress should deem it expedient, or upon the happening of some contingency, as in the case of the Pottawatomie Indians.

It will also be shown by the statutes that many treaties were made after the treaty of 1863 with the Red Lake and Pembina bands of Chippewas, wherein reservations or grants were made to the Indians, and that in all cases where it was intended by the contracting parties that a greater title than the Indian right of occupancy should pass, it has been distinctly expressed.

That the reservations in the Kansas treaty of 1825 (supra) did not convey any fee is conclusively shown by the act of May 26, 1860 (12 Stats., 21), in which Congress vested all the title, interest and estate of the

United States to the lands reserved in the reservees, provided that they were not given any right to sell or dispose of the lands or enter into any contract in writing or otherwise having binding effect on said lands without the approval of the Secretary of the Interior, and the further fact that by the joint resolution of July 17, 1862 (12 Stats., 628), Congress repealed that part of the act of 1860 which prohibited sales and conveyances by the reservees, thereby vesting in them the complete fee; also by the decision of the supreme court in Smith vs. Stevens (10th Wallace, 321), wherein the court held that a deed from a Kansas half-breed Indian conveying the lands reserved under said treaty of 1825, prior to the joint resolution of 1862, was absolutely null and void.

The errors of the court below in reaching its conclusions in this case will be more pointedly apparent upon an examination of the authorities cited in support of its contention.

In the first place, the court refers to the act of 1849 (9 Stats., 403-408), organizing the territory of Minnesota, wherein, by the 18th section, it is provided that when the lands in said territory shall have been surveyed under the direction of the Government of the United States, preparatory to bringing the same into market, sections numbered 16 and 36 in each township in said territory shall be and "the same are hereby reserved for the purpose of being applied to schools in said territory and in the states and territories hereafter to be erected out of the same," and to the act of 1857 (11 Stats., 166), enabling the people of the territory of Minnesota to form a constitution and state government preparatory to their admission into the Union, in which act it was provided that 72 sections

of land "shall be set apart and reserved for the use and support of a state university to be selected by the Governor of said state, subject to the approval of the Commissioner of the General Land Office, and to be appropriated and applied in such manner as the legislature of said state may prescribe for the purpose aforesaid, but for no other purpose," and the court declared that in neither of the cases of the two acts cited has it ever been questioned but that a fee simple passed, although no patents have been issued, or were necessary to confer title to the lands.

It is a fact, however, that when the government of the United States, in organizing territories of the United States, reserve lands for school purposes, no title whatever passes to the territory. This was evidently thought to be the fact in the case of the territory of Minnesota, otherwise there would have been no necessity whatever for the act of February 19, 1851 (9 Stats., 568), authorizing the Governors of the territories of Oregon and Minnesota, and the legislative bodies thereof, "to make such laws and needful regulations as they shall deem most expedient to protect from injury and waste sections numbered 16 and 36 in said territories reserved in each township for the support of schools therein."

That the territories have no control over the reserved school sections is shown by the many acts of Congress, when it has been deemed advisable, authorizing the leasing of school lands within the territories. See act of January 9, 1815 (3 Stats., 163), relating to the school lands within the territory of Mississippi; also the act of 1894 (28 Stats., 71) relating to the school lands within the territory of Oklahoma; also act of June 13, 1812 (2 Stats., 748), reserving land for school

purposes for the city of St. Louis and other towns within Missouri, and the act of January 27, 1831 (4 Stats., 435), granting the fee in the reserved lands to the towns intended to be benefited. These acts show that in the cases named the government did not construe a reservation as conveying the fee.

Nor did any fee pass to the state of Minnesota by the provisions contained in the act of 1857, concerning the reservation of 72 sections for university purposes. In that case the state took only as trustee, with a discretion as to the manner in which the land should be disposed of, but without discretion as to the purpose to which they should be applied.

Rice vs. Railroad Company, 1 Black 358.

The decision of the supreme court in Gaines vs. Nicholson, 9 Howards 365, does not support the position of the court below, but, rather, is in support of the contention of the appellant.

In that decision the question of a right of an Indian reservee under the Choctaw treaty of Dancing Rabbit Creek of September 27, 1830 (7 Stats., 333), or the grantee of such reservee as against the right of the territory of Mississippi in the school section was under consideration, and it was held that the reservation was "so much carved out of the territory ceded and remain to the Indian occupant, as he had never parted with it. He holds, strictly speaking, not under the treaty of cession, but under his original title confirmed by the government in the act of agreeing to the reservation."

In the case of that decision the articles of treaty being construed were supplementary to the main treaty of the Indians which provided for the giving of reservations to the Choctaws, and which had to be

considered in its entirety in the construction of the rights passed to the reservees.

In the main treaty it is provided that in the construction of the treaty, wherever well founded doubts should arise, it should be construed most favorable towards the Choctaws; and taking the whole treaty into consideration, the clear intention was that the reservees should have the right of alienation under certain conditions.

The case of Glenn vs. Glenn (41 Alabama 582) does not appear to be applicable to the questions involved in this case.

In Best vs. Polk (18 Wallace 112) the treaty under consideration was that with the Chickasaw Nation of May 24, 1834 (7 Stats., 450); no decision concerning the rights of reservees under that treaty would be applicable in this case, in view of the language used providing for the reservations and the circumstances under which the treaty was negotiated.

It will be observed that by article 5 it is provided "that it is agreed that the fourth article of the treaty of 'Pontitock' be so changed that the following reservations be granted in fee," followed by the description of the reservations meant; and that the next article begins with the words "also reservations of a section to each shall be granted to persons, male and female," etc.

But the fourth article of the treaty contains much more significant language, and conveys a very clear idea of the intention of the contracting parties with regard to the title that would be taken by the reservees generally under the treaty. That article is in part as follows:

"The Chickasaws desire to have within their own

direction and control the means of taking care of themeslves. Many of their people are quite competent to manage their affairs, though some are not capable and might be imposed on by designing persons; it is therefore agreed that the reservations hereinafter admitted shall not be sold, leased or disposed of unless it appear by the certificate of at least two of the following persons * * * that the party owning or claiming the same is capable to manage and to take care of his or her affairs, which fact, to the best of his knowledge and information, shall be certified by the agent; and, furthermore, that a fair consideration has been paid; and thereupon the deed of conveyance shall be valid, provided the President of the United States, or such other person as he may designate, shall approve of the same and endorse it on the deed." * * *

In view, therefore, of the language of this treaty and the expressed and elaborate arrangements for the alienation of the reservations, no decision confirming the title of the reservees under that treaty would authorize the court to declare that the "Moose Dung" reservation was granted in fee by the Chippewa treaty of 1863, which contains nothing indicating such an intention.

The decision in Newman vs. Doe, 4 How. (Miss.) 561, cited by the court, involves questions touching the rights of a Choctaw Indian reservee under the Dancing Rabbit Creek treaty, and can have no bearing on this case for the reasons above assigned to show the inapplicability of the decision in Gaines vs. Nicholson (supra), to-wit: The language used in that treaty touching reservations contain words intended to authorize the sale of the reservations by the reservees under certain conditions and limitations.

Niles vs. Anderson, 5 How. (Miss.) 365, involved a reserve under the Chickasaw treaty of May 24, 1834 (supra), and since, as is above shown, provision was made in that treaty for the sale of the reservations by the reservees, this case cannot be invoked to sustain a contention that the ninth article of the Chippewa treaty of 1863 was intended to convey the fee in the reservation thereby provided to be "set apart" for the chief "Moose Dung," as neither in that article nor in any other provision of the treaty were any words used that can, by any reasonable interpretation, be construed as providing for the sale, lease or other conveyance by the said chief of the lands reserved.

The case of the United States vs. Brooks (10 How. 442) involved the grants provided for in the supplementary articles to the Caddo treaty of July 1, 1835 (7 Stats., 472), and, as the language used in those articles contained both words of inheritance and perpetuity, to-wit: in article 1 the words "their heirs and assigns forever," and in article 2 the words "his heirs and assigns forever," this case is not in point to sustain the conclusion reached by the court below touching the title of the heirs of the reserve in the "Moose Dung" reservation.

The case of Doe vs. Wilson (23 How. 457) not only does not authorize the conclusions of the court below, but strongly sustains the contention of the appellant, that the right of the heirs of Chief "Moose Dung" in the reservation is the Indian right of occupancy. That case involved a reservation under the Pottawatomie treaty of October 27, 1832 (7 Stats., 399), which provided for individual reservations, and promised that they should be conveyed by patent, as follows: "The United States agree to grant to each of the following

named persons the quantity of land annexed to their names, which lands shall be conveyed to them by patent," etc.

It will be observed that these reservations were to be granted, not set apart for the persons named, yet in discussing these grants the court in Doe vs. Wilson said: "The reservee took by treaty, directly from the Nation, the Indian title, and it was right of occupancy use, and enjoyed his lands in common with the United States until partition was made. The treaty itself converted the reserved sections into individual property." The reservees under the ninth article of the Chippewa treaty of 1863 took "by treaty directly from the bands parties to said treaty the Indian title of use and occupancy, and they have, since the reservees have been located, enjoyed the land in common with the United States; but there was no provision in the treaty contemplating a partition, and no partition has in fact been made. They, therefore, still have only the Indian right of occupancy, which is a right to use without the right of alienation, except to the United States, with their consent, given in lawful manner and under lawful authority.

The remaining case cited by the court in support of its conclusions is Prentice vs. R. R. Co. (43 Fed. Rep. 275). This suit related to the chief Buffalo reservation under the Chippewa treaty of 1854 (10 Stats. 2199), which provided that "and being desirous to provide for some of his connections, who have rendered his people important services, it is agreed that Chief Buffalo may select one section of land at such place in the ceded territory as he may see fit, which shall be reserved for that purpose, and conveyed by the United States to such person or persons as he may direct." In this case

the promise that the United States would convey the selected land converted the title, not the provisions, for the selection of the one section by the chief, and the case is not one in point.

It will be seen from the examination given to the authorities cited by the court below that it has never been held by any court that the words "set apart," "reservation" and similar terms in themselves convey a fee in the lands affected, and in all cases where it has been held that the reserve took a larger estate than that of the tribe, the words of reservation have been used in connection with other words, qualifying or enlarging the title which passed by the reservation.

The case of Monsimoh vs. appellees was not dismissed because of want of authority in the solicitor of appellant to bring the action, but because the diverse citizenship between an Indian, not a citizen, and a white man, the citizen of another state, does not confer jurisdiction on the federal courts. Judge Lochren remarked that the solicitor had abundant authority for endorsing the bill, and that it appeared that the complainant Monsimoh had signed the bill, which alone would be sufficient authority.

Respectfully submitted,

JAMES A. KELLOGG,

Counsel for Appellant